BRIEF SUPPORTING PETITION

I.

THE DEFENDANT WAS NEGLIGENT

The place in which plaintiff was required to work was dangerous. The platform, fifteen feet in width, was divided by a line of posts up and down the center, leaving a space about seven feet wide in which the men were required to push their trucks (R-75). The trucks were over two feet in width (R-83). The runways on which the trucks were supposed to be wheeled were about fifteen inches from the sides of the cars (R-74). There were eighteen cars along the platform, with the doors open, and men were continually wheeling trucks, loaded and unloaded, in and out of these doors. There were no rules regulating these movements except one rule which provided that loaded trucks should be pulled out of cars and not pushed (R-89). There were sixty to eighty men engaged in this operation (R-80, 89). The steel runways were smooth and slippery from fifteen years of constant use (R-88). This was not disputed. There were no guard rails or guards protecting the doorways (R-88). No signal, warning, or other means was provided to indicate when a truck was to be brought out of a car, except the rule that loaded trucks should be pulled out and not pushed (R-89).

With such an arrangement as this, little argument, if any, is required to demonstrate the dangerous condition which existed. As a man pushed his truck along the runways, only fifteen inches from the sides of the cars, he was confronted about every forty or fifty feet with an open door out of which at any moment a heavy, loaded truck might be pushed directly into him, or so close to him that he might be injured, as was plaintiff. It would be impossible for a man walking along so close to the sides of the cars to see into the car before he reached the doorway. Likewise, it would be impossible for a man coming out of a car with a truck to see if the platform were clear until he reached the edge of the car. The danger of

this situation was apparently recognized by defendant. Hence the rule that trucks should be pulled out of cars instead of pushed out. But this rule was not enforced, which constitutes negligence. Furthermore, if the defendant realized, as it did, that there was danger created by the movement of trucks out of cars under the conditions which it created and maintained, the defendant then was negligent in not providing guards or warnings as well as a rule which it failed to enforce.

Furthermore, the runways, as far as appears, could have been placed on the inner side of the platform near the posts and away from the sides of the cars. This would place the men on the runways four or five feet away from the doors with a much better chance to see into the cars and to be seen from the cars.

The runways themselves were smooth and slippery, thus creating an additional hazard. No attempt was ever made by defendant to remedy this condition by the use of paint, abrasives or other means to eliminate the slippery condition. Yet the defendant knew that the men, going in all directions, up and down and across, and turning in and out for one another, would be obliged to step on the slippery steel; and in pushing heavy loads, even an empty truck weighs 125 pounds, firm footing is a necessity.

There were sixty to eighty men pushing trucks loaded with all manner of objects, some of great size and weight, in all directions, with no rules to guide their movements. The confusion and danger is easy to perceive.

The act of the employee who pushed the truck with the large crate suddenly and without warning into plaintiff's path was certainly a negligent act. In so doing, he violated the rule of the defendant. The crate was so large he could not see ahead (R-129) and he failed to look. If he had been pulling the truck as required, he could have seen plaintiff in time to stop. His act was in utter disregard of plaintiff's safety.

The jury was justified in considering all of these circumstances in weighing the negligence of the defendant.

Bailey v. Central Vermont Ry., 319 U. S. 350.
Bimberg v. Northern Pac. R. R., 14 N. W. 2nd, 410.
Ross v. Louisville & N. R. Co., 172 So. 752.
McGivern v. Northern Pac. R. R., 132 F. 2nd, 213.
Tennant v. Peoria & P. U. Ry. Co., 321 U. S. 29.
Owens v. Union Pac. R. Co., 319 U. S. 715.

II.

PLAINTIFF HAS, IN EFFECT, BEEN DEPRIVED OF A JURY TRIAL.

The appellate courts of New York had no right to substitute their judgment on the facts in place of the judgment of the jury. It is the province of the jury to determine the facts as to whether or not the defendant was negligent.

> "The debatable quality of that issue, the fact that fair-minded men might reach different conclusions, emphasize the appropriateness of leaving the question to the jury. The jury is the tribunal under our legal system to decide that type of issue."
> Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54.
> Bailey v. Central Vermont, supra.

> "The right to trial by jury is a basic and fundamental feature of our system of federal jurisprudence (Jacob v. New York City, 315 U. S. 752). It is part and parcel of the remedy afforded railroad workers under the Employers' Liability Act."
> Bailey v. Central Vermont, supra.

> "It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, receives expert instructions, and draws the ultimate conclusions as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. (Washington & Georgetown R. Co. v. McDade, 135 U. S. 554; Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54; Bailey v. Central Vermont Ry., 319 U. S. 350). That conclusion whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not

> free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions, or because judges feel that other results are more reasonable.
>
> Tennant v. Peoria, &c. Ry. Co., 321 U. S. 29.

Thus the Court of Appeals of the State of New York, in holding that there was no proof of negligence after a jury had decided that there was such proof, has deprived plaintiff of the rights, privileges and remedy afforded him under the Federal Act. If the Court of Appeals has such power, then litigants in the State of New York under the Federal Employers' Liability Act are not receiving rights and remedies accorded to such litigants in the Federal Courts and in other states.

In a recent case this Court said:

> "There is thus presented the problem of whether sufficient evidence of negligence is furnished by the record to justify the submission of the case to the jury. In Employers' Liability cases, this question must be determined by this Court finally. Through the supremacy clause of the Constitution, Art. VI, we are charged with assuring the Act's authority in state courts. Only by a uniform federal rule as to the necessary amount of evidence may litigants under the federal act receive similar treatment in all states."
>
> Brady v. Southern R. R., 320 U. S. 476.

III.

THE DECISION OF THE NEW YORK STATE APPELLATE COURTS IS IN CONFLICT WITH THE FEDERAL STATUTE AND DECISIONS OF THE FEDERAL COURTS, AND HAS ABOLISHED THE AUTHORITY OF THE FEDERAL ACT IN THE STATE OF NEW YORK.

Under this point we believe it will suffice to refer to the statute involved and the recent decisions thereunder.

U. S. C. A., Title 45, Secs. 51-54.

Tiller v. Atlantic Coast Line Ry., supra.
Bailey v. Central Vermont Ry., supra.
Brady v. Southern R. R., supra.

IV.

THE DECISION OF THE COURT OF APPEALS OF THE STATE OF NEW YORK, WHEREIN IT AFFIRMS, WITHOUT OPINION, THE DECISION OF THE APPELLATE DIVISION, CREATES CONFUSION AS TO THE PRESENT STATUS OF THE LAW REGARDING THE SO-CALLED DOCTRINE OF ASSUMPTION OF RISK.

Assumption of risk as a defense was abolished by Congress by the 1939 amendment.

U.S.C.A. Title 45, Sec. 54.
Tiller v. Atlantic Coast Line, supra.

The majority opinion of the Appellate Division (R-165), reported in 268 App. Div. 59, completely ignores the statute and the subsequent decision of this Court in the Tiller case as well as the decisions of other federal courts following the Tiller case. This decision having been affirmed by the Court of Appeals without opinion and by a divided court with the simple statement that there was no proof of negligence leaves the status of the law on this question in the State of New York confusing and doubtful.

The said decision in effect affords railroads operating within the State of New York a defense to actions brought under the Federal Employers' Liability Act which railroads operating in other states do not have.

Conclusion

FOR THE FOREGOING REASONS STATED IN THE PETITION AND BRIEF HEREIN, IT IS RESPECTFULLY SUBMITTED THAT THE PETITION FOR A WRIT OF CERTIORARI IN THE INSTANT CASE SHOULD BE GRANTED.

Dated February 7, 1945.

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